UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 1 – SUBREGION 34

COMMUNITY HEALTH SERVICES, INC. and AMERICAN FEDERATION OF TEACHERS, CT	Cases 01-CA-191633

RESPONDENT'S BRIEF

Introduction

This case arises under the Board's August, 2016 decision in *Total Security Management*, 364 NLRB No. 106, which held that an employer must engage in limited bargaining with a newly certified union before imposing certain types of discipline on bargaining unit employees. After the Charging Party, American Federation of Teachers, CT ("AFT" or Union") was certified as the bargaining representative of a group of Medical Assistants and Dental Assistants at Community Health Services, Inc. ("CHS"), but before the parties had reached an initial collective bargaining agreement, one of the bargaining unit members engaged in misconduct that CHS management believed could warrant discipline. CHS placed the employee on paid administrative leave and then met with an AFT representative to discuss the incident and possible discipline. More than a week after that meeting, CHS discharged the employee.

The General Counsel alleges that even though CHS bargained with the Union about the discipline prior to imposing the discipline, it somehow did not bargain *enough*. While *Total Security* was wrongly decided and should be reversed, that issue need not even be reached in this case because CHS complied with *Total Security's* mandate. CHS provided the Union with notice and an opportunity to bargain before imposing discipline. It gave the Union sufficient advance notice to provide for meaningful discussion concerning the grounds for imposing discipline and the grounds for the discipline chosen. The Union had the opportunity to provide exculpatory or mitigating information to CHS, to point out any perceived disparate treatment, and to suggest alternative courses of action. CHS and the Union did not reach agreement or impasse on the issue, but *Total Security* makes clear that an employer is not required to bargain to agreement or impasse prior to imposing discipline.

Given how closely CHS' conduct mirrors the process described in *Total Security*, it is puzzling that the General Counsel chose to proceed on this case at all. All the more puzzling is the General Counsel's insistence upon seeking back pay and reinstatement in this case when the undisputed evidence establishes that CHS had "cause" to terminate the employee as that term has uniformly been applied by the Board under Section 10(c) of the Act and as described in *Total Security,* thus precluding the Board from ordering reinstatement or back pay in this case.

The General Counsel's pursuit of this matter was wholly unjustified and the matter should be dismissed.

Facts

The essential facts in this case are, in large measure, undisputed.

On January 3, 2017, Annie Howley, the Nurse Manager in CHS' Adult Medicine Department, ran into Kylie O'Donnell, CHS' Business Improvement Quality Coordinator, and noticed that Ms. O'Donnell seemed upset. Tr. 310-12 (Howley). Ms. Howley asked Ms. O'Donnell what was troubling her and, after some prodding, Ms. O'Donnell reported that she had just had a very negative interaction with Dirgni Baker, one of the Medical Assistants who worked in the Adult Medicine Department. Tr. 459-60 (O'Donnell); Tr. 311-12 (Howley).

It was then Ms. Howley who got upset. Over the prior eighteen months, Ms. Howley had been dealing with Ms. Baker's repeated disruptive and disrespectful conduct through coaching, counseling, and discipline, and nothing seemed to work. GC-6; Tr. 271-309 (Howley). Ms. Howley gathered some additional facts, speaking with others who had been present during the interaction, and then sent Ms. Baker home, putting her on a paid administrative leave pending further investigation. Tr. 315 (Howley); Respondent's Exhibit 1. The paid administrative leave, in and of itself, had no immediate or inevitable impact on Ms. Baker's tenure, status, or earnings at CHS.

Ms. Howley worked with Genea Bell, CHS' Chief Legal and Human Resources Officer, to obtain statements from witnesses, review Ms. Baker's lengthy file, and interview Ms. Baker about the January 3 incident. Tr. 65-70 (Bell). The various witnesses to the January 3 incident all told essentially the same story, one in which Ms. Baker was somewhat rude to Ms. O'Donnell in an area near patients and families of patients. GC 6, pp. 1-8; Tr. 455-57 (O'Connell); Tr. 493-

96 (Santiago). Ms. Baker's file reflected repeated problems with a variety of co-workers and significant efforts by Ms. Howley and others to fix those problems. GC-6, pp. 9-30.

On January 10, 2017, Ms. Bell met with Ole Hermanson, Ms. Baker's union representative to discuss the January 3 incident. Tr. 22-25 (Hermanson); Tr. 66-68, 70-73 (Bell). During that meeting, Ms. Bell indicated that while the January 3 incident standing alone might not seem very serious, it did not stand alone and was consistent with Ms. Baker's past behavior for which CHS had repeatedly disciplined her. Tr. 72, 188 (Bell); GC-11 p. 8; Tr. 23 (Hermanson: "She had said that Dirgni had, you know, a prior work history that was problematic."; "She said that Dirgni had already had a final warning and that she had, you know, a complicated work history.") Tr. 46-50 (Hermanson). Mr. Hermanson suggested that further counseling might be an appropriate alternative to termination. Tr. 23 (Hermanson: "I said that I felt like if there were – if there was something that we needed to do, if we wanted to discuss Ms. Baker going to EAP or having more training, that we could talk about that."); Tr. 48-49 (Hermanson); Tr. 72 (Bell). Mr. Hermanson did not ask to review Ms. Baker's file or make any inquiry into the nature of the prior incidents or CHS' response to those incidents. Tr. 73 (Bell). Mr. Hermanson did not request any additional information from CHS before January 18, 2017.

Following the meeting with the Union, CHS, through Ms. Howley and Ms. Bell, decided that Ms. Baker's employment with CHS should end. As Ms. Howley testified, the January 3 incident was a continuation in a pattern of rude, disrespectful, and disruptive behavior that had been going on for more than a year and a half. Tr. 316 (Howley). CHS had tried counseling, formal discipline, and even a formal team building exercise lasting several days, and the January 3 incident caused Ms. Howley to believe that none of their efforts had worked. Tr. 316 (Howley).

On January 18, 2017, Ms. Bell informed Ms. Baker and Mr. Hermanson that CHS was terminating Ms. Baker's employment. GC-5; GC-6.

At that point, Mr. Hermanson requested to continue bargaining concerning Ms. Baker's situation. Tr. 31 (Hermanson); GC 8. Ms. Bell responded, agreeing to continue meeting. GC 9; Tr. 32 (Hermanson). The issue was briefly raised during a bargaining session for new collective bargaining agreements for two bargaining units in February, 2017 but that session was too full to discuss the issue at any length. Tr. 41-42 (Hermanson); Tr. 522-24 (Volpe). In March, 2017, Ms. Bell e-mailed Mr. Hermanson and said that if the Union wanted to continue to discuss Ms. Baker's discipline that CHS would be glad to do so. Tr. 37-38 (Hermanson); GC 10. Mr. Hermanson never responded, and no one else from the Union followed up on that offer. Tr. 38 (Hermanson).

Argument

I. CHS Did Not Violate The Act

The Board's decision in *Total Security* was at odds with decades of experience under the Act and should be reversed. This case, however, does not present a good opportunity for such a reversal because CHS fully complied with *Total Security's* requirement that it give the Union notice of potential discipline and an opportunity to comment on its appropriateness. The arguments of the General Counsel – that a paid administrative leave requires advance bargaining; that the meeting between the employer and the Union in this case was somehow not *enough* bargaining, and that CHS' ultimate decision was inappropriate, would involve expanding *Total Security* even farther than the Board stretched the Act in 2016. There is no justification for that in this case.

1. *Total Security* Was Wrongly Decided

For the reasons set forth by Member Miscimarra in his dissent in *Total Security*, 364 NLRB No. 106 at 17-41, which Respondent incorporates herein by reference, *Total Security* was wrongly decided and should be reversed.

As explained in detail below, however, CHS *complied with* the process set forth in *Total Security*. CHS is a not for profit health care center that provides medical care to a socioeconomically disadvantaged population; litigating over changing Board precedent under the National Labor Relations Act is not part of CHS' core mission. While the current General Counsel may be looking for cases that present a challenge to Board decisions from the last administration (*See* General Counsel Memo GC-18-01 "Mandatory Submission to Advice" December 1, 2017), this case should simply end at the ALJ level with a finding that CHS did not violate the Act as interpreted by *Total Security*, and leave to another more suitable case, the task of litigating whether *Total Security* should remain good law. Should the ALJ find that CHS did not comply with *Total Security*, the Board should overrule *Total Security*.

2. CHS Satisfied *Total Security* By Bargaining.

a. There Was No Duty to Bargain Before Placing Ms. Baker on Paid Administrative Leave.

The *Total Security* decision was very clear that the duty to bargain that the Board discovered in that case was limited:

> First, as explained above, the pre-imposition obligation attaches only with regard to the discretionary aspects of those disciplinary actions that have an inevitable and immediate impact on an employee's tenure, status, or earnings, such as suspensions, demotions, or discharge. Thus, most warnings, corrective actions, counselings, and the like will not require pre-imposition bargaining, assuming they do not automatically result in more

serious discipline, based on an employer's progressive disciplinary system, that itself would require such bargaining.

364 NLRB No. 106 at 8.

On January 3, 2017, CHS placed Ms. Baker on paid administrative leave. Tr. 233-34 (Baker); Tr. 315 (Howley); Tr. 43 (Hermanson); R-1. She continued to receive her normal pay. R-1; GC-20. The paid administrative leave had no inevitable and immediate impact on Ms. Baker's tenure, her status, or her earnings. Paid administrative leave does not even rise to the level of a warning or a corrective action; those actions stay in an employee's file and influence future decisions, even if they do not dictate them. Paid administrative leave, in contrast, does none of those things. Ms. Baker testified that Ms. Howley did not tell her that she was being disciplined in any sort of way by being sent home on January 3, 2017. Tr. 237 (Baker).

The General Counsel presented absolutely no evidence that could support a finding that the paid administrative leave on which CHS placed Ms. Baker had any inevitable and immediate impact on her tenure, status, or earnings. To the extent that the General Counsel asserts that CHS violated *Total Security* by failing to bargain with the Union in advance of placing Ms. Baker on paid administrative leave, as indicated in the General Counsel's opening statement (Tr. at 8) that portion of the Complaint should be swiftly dismissed.

b. <u>The January 10, 2017 Meeting Satisfied CHS' Bargaining Obligation</u>

The *Total Security* decision was also very clear that the duty to bargain over actual discipline was itself limited:

> Second, where the pre-imposition duty to bargain exists, the employer's obligation is simply to provide the union with notice and an opportunity to bargain before discipline is imposed. This entails sufficient advance notice to the union to provide for meaningful

> discussion concerning the grounds for imposing discipline in the particular case, as well as the grounds for the form of discipline chosen, to the extent this choice involved an exercise of discretion. It will also entail providing the union with relevant information, if a timely request is made, under the Board's established approach to information requests. . . . The aim is to enable the union to effectively represent the employee by, for example, providing exculpatory or mitigating information to the employer, pointing out disparate treatment, or suggesting alternative courses of action. But the employer is not required to bargain to agreement or impasse at this stage; rather, if the parties do not reach agreement, the employer may impose the selected disciplinary action and then continue bargaining to agreement or impasse.

264 NLRB No. 106 at 8-9. CHS fully complied with this mandate.

In his opening statement, Counsel for the General Counsel made the absurd statement that "we contend that no bargaining took place at that [January 10, 2017] meeting." Tr. at 9. The testimony presented by the General Counsel at the hearing shows, in contrast, that CHS and the Union did bargain under any definition of that term, but certainly under the definition set forth in *Total Security*.

CHS gave the union advance notice and an opportunity to bargain well before imposing discipline on Ms. Baker. CHS notified the Union by e-mail on January 4, 2017 of the paid administrative leave and the need for further investigation. Tr. 44 (Hermanson); Tr. 65 (Bell); R-1. Ms. Bell met with Mr. Hermanson on January 10, 2017 and the meeting lasted about 15 minutes. Tr. 49 (Hermanson) Tr. 71 (Bell). CHS did not impose discipline on Ms. Baker until over a week later, on January 18, 2017. GC 7; Tr. 30 (Hermanson). The Union clearly had sufficient advance notice.

Moreover, the advance notice given to the Union provided sufficient information for the Union to meaningfully discuss both the grounds for imposing discipline in the particular case and the grounds for the form of discipline chosen. The January 4, 2017 notice to Ms. Baker and her Union representatives noted that Ms. Howley had been informed of a confrontation with other

staff members regarding a provider's schedule and that her conduct "may have negatively impacted clinical operations and failed to meet expectations for patient service." R1; Tr. 44 (Hermanson). It further noted Ms. Baker's disciplinary history for similar infractions. R1. At the meeting between herself and Mr. Hermanson, Ms. Bell noted that the January 3 incident, while perhaps not itself terribly serious, could be the "straw that broke the camel's back" (or words to that effect) given Ms. Baker's history of similar problems and behaviors. Tr. 47-48 (Hermanson); Tr. 721 (Bell). Thus the Union was well aware, more than a week before CHS finalized the decision to terminate Ms. Baker, that CHS was considering serious discipline, up to termination, because of Ms. Baker's work record and the final January 2017 notice. Moreover, Mr. Hermanson testified that as of the January 10, 2017 meeting "I certainly thought that discipline was a possibility and a likelihood." Tr. 49.

With that advance notice, the Union could have requested additional information from CHS, but it chose not to do so. Between the January 10, 2017 meeting between Ms. Baker and Mr. Hermanson and the January 18, 2017 decision to terminate Ms. Baker's employment, the Union did not request to review Ms. Baker's previous disciplinary history; it did not request to review any other incidents involving Ms. Baker's interactions with co-workers; it did not request information related to any counseling or training given Ms. Baker or other employees; it did not request information related to the way CHS treated other employees involved in disputes or the circumstances surrounding any such instances. In short, the Union chose not to pursue any additional information or bargaining with CHS between January 10, 2017 and January 18, 2017.

The General Counsel seemed to imply at the hearing that CHS did not comply with *Total Security* because the individual CHS chose to be its bargaining representative, its Chief Legal and Human Resources Officer, was not the sole and final decision-maker with regard to

the termination decision. An employer has the right to select its own bargaining representative. *See* Section 8(b)(1)(b) of the Act. Genea Bell is CHS' Chief Legal and Human Resources Officer. Tr. 62-64 (Bell). She reports directly to CHS' Chief Executive Officer. Tr. 63 (Bell). Ms. Bell exercises significant control over labor and human resources matters at CHS. Tr. 177-80 (Bell). Ms. Bell exercised significant control over the decision to terminate Ms. Baker's employment. There is absolutely no basis for arguing that CHS violated *Total Security* by sending Ms. Bell rather than another representative to meet with the union about the potential discipline. Moreover, even after Ms. Bell told the Union representative that she would not be making the final decision the Union never asked to speak to whichever individual or individuals would be making the final decision.

The General Counsel also appeared to argue at the hearing that CHS violated *Total Security* because Ms. Howley had wanted to terminate Ms. Baker's employment before Ms. Bell met with the Union. As the *Total Security* decision itself states:

> [T]he obligation to provide the union with notice and an opportunity to bargain arises *after* the employer has decided, at least preliminarily, that discipline is warranted, but before the employer has actually imposed discipline.

364 NLRB No. 106 at 7, FN 17 (emphasis in original). Thus, whether or not Ms. Howley believed that termination was appropriate on January 3, 2017, or any time between then and the meeting between Ms. Bell and Mr. Hermanson, is irrelevant to whether CHS satisfied its bargaining obligation under *Total Security*; in fact that case anticipates that bargaining will generally occur *after* the employer has some idea that discipline is appropriate.

The General Counsel also appeared to argue at the hearing that the *Total Security* bargaining was somehow tainted because Ms. Howley was at least as concerned about an

incident involving Ms. Baker from October, 2016 as she was about the January, 2017 incident. The initial notice to the Union on January 4, 2017 indicated that Ms. Baker's record included prior incidents similar to the January 4, 2017 incident under investigation. R1. Ms. Bell indicated to Mr. Hermanson at their meeting that Ms. Baker had engaged in similar misconduct in the past and that this incident might be the "straw that broke the camel's back." Tr. 72, 188 (Bell); Tr. 23, 46-50 (Hermanson). Ms. Baker herself was certainly aware of the October, 2016 incident and the possibility of discipline, up to termination, for that incident. As noted above, the Union chose not to follow up with CHS to determine the entirety of Ms. Baker's prior conduct; that was the Union's choice as Ms. Baker's bargaining representative – CHS cannot be held to have failed to bargain because the Union chose not to explore certain avenues available to it.

CHS fully complied with the teaching of *Total Security*. It notified the Union that it was considering discipline for Ms. Baker, it met with the Union and discussed various options, it gave the Union plenty of time to digest that meeting and ask for additional information if it wanted, and only then finalized and implemented its decision. Requiring an employer to do more than CHS did in this case would put form over substance and make compliance with the limited bargaining obligation of *Total Security* even more unwieldy and formalistic than the case itself calls for.

c. The Union Failed to Respond to CHS' Invitations to Continue Bargaining

The *Total Security* decision makes clear that "[a]fter fulfilling its pre-imposition responsibilities as described above, the employer may act, but it must continue to bargain concerning its action, including the possibility of rescinding it, until it reaches agreement or impasse." 364 NLRB No. 106 at 9. CHS invited the Union to participate in such bargaining on

at least two occasions, but the Union put off the first invitation and simply ignored the second invitation. Tr. 77-78 (Bell).

On Thursday, January 19, 2017 the day after CHS e-mailed the termination paperwork to the Union, Mr. Hermanson emailed Ms. Bell requesting dates to bargain over the issue. GC-8. Ms. Bell responded that afternoon, indicating that "I am available next Monday morning, Tuesday afternoon between 12 and 4 and anytime on Wednesday." GC-9. Mr. Hermanson did not respond by e-mail, but testified that he suggested that the matter be discussed when the parties next met to engage in collective bargaining. Tr. 33 (Hermanson). The bargaining session that had been scheduled for January 24, 2017 was cancelled at the Union's request. Tr. 33 (Hermanson). When the parties finally did meet on February 16, 2017, the session involved discussions with a newly appointed federal mediator concerning both the Medical Assistant bargaining unit of which Ms. Baker was a member and the Licensed Professional bargaining unit, also represented by the Union. Tr. 33-34 (Hermanson); Tr. 521-25 (Volpe). As Dr. Julie Volpe testified, the meeting was, by previously agreed ground rules, limited to two hours and most of that time was spent discussing some of the more difficult unit-wide issues facing the two bargaining units. Tr. 522-525 (Volpe). While Mr. Hermanson may have demanded that Ms. Baker be reinstated, the format did not allow for extended discussion of the issue. Tr. 524 (Volpe).

On March 30, 2017 Ms. Bell e-mailed Mr. Hermanson offering to continue bargaining over Ms. Baker's discipline. GC 10. Tr. 26-38 (Hermanson). Neither Mr. Hermanson nor anyone else from the Union ever responded to Ms. Bell's offer. Tr. 38 (Hermanson).

Not only did CHS meticulously follow the dictates of *Total Security* before terminating Ms. Baker, the Union failed to properly continue bargaining after the termination despite repeated invitations from CHS to do so.

II. Section 10(c) of the Act Precludes Reinstatement or Back Pay

As explained above, CHS did not commit an unfair labor practice. However, even if the Administrative Law Judge incorrectly concludes that CHS' notice to and meeting with the Union in advance of terminating Ms. Baker's employment did not satisfy the Board's decision in *Total Security*, the ALJ should not order that CHS reinstate Ms. Baker or pay Ms. Baker any back pay because CHS terminated Ms. Baker for cause. Reinstating Ms. Baker or paying her back pay would not effectuate the purpose of the Act and, more importantly, is expressly prohibited by the Act itself.

Section 10(c) of the Act empowers the Board to order employers that have committed an unfair labor practice to cease and desist from such practice and to take certain affirmative actions, including reinstatement of employees with or without back pay, if it determines that doing so would effectuate the purposes of the Act. 29 U.S.C. § 160(c). However, that section contains a critical explicit limit on the Board's power when it comes to reinstatement of employees and the payment of back pay:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. § 160(c).

CHS terminated Ms. Baker as a result of repeated misconduct that had been the subject of progressive discipline, coaching, and counseling. Ms. Baker was rude to a fellow employee on

January 3, 2017 and, given the similarity of that conduct to the conduct for which Ms. Baker had been warned and counseled in the past, CHS had ample cause to terminate her employment. The General Counsel has not alleged that CHS' decision to terminate Ms. Baker had any unlawful motive, and the evidence at the hearing would not have supported such an allegation had it been made.

1. The Legal Standard for "Cause" Under Section 10(c) of the Act

Section 10(c) of the Act prohibits the Board from reinstating an employee or providing back pay, "if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). The Board has had several occasions to explore the meaning of "cause" under Section 10(c) and has consistently held that it means any reason that is not prohibited by the Act.

The Board first expounded on what the term "cause" meant in Section 10(c) in *Taracorp Industries*, 273 NLRB 221 (1984). In that case, the Board found that the employer failed to honor an employee's request for union representation in an interview with management that could lead to discipline, a violation of the Supreme Court's decision almost a decade earlier in *NLRB v. Weingarten*, 420 U.S. 251 (1975). The employer terminated the employee following that improper investigatory interview. The question was whether the Board could order reinstatement and back pay as a remedy for that violation when the reason for the termination was the employee's own misconduct, not the employer's failure to allow the employee union representation.

The Board in *Taracorp* unequivocally held that:

> an employee discharged or disciplined for misconduct or any other nondiscriminatory reason is not entitled to reinstatement and back pay even though the employee's Section 7

rights may have been violated by the employer in a context unrelated to the discharge or discipline.

273 NLRB at 222. The Board further explained:

> It is important to distinguish the term "cause" as it appears in Sec. 10(c) and the term "just cause," which is a term of art traditionally applied by arbitrators in interpreting collective bargaining agreements. Just cause encompasses principles such as the law of the shop, fundamental fairness, and related arbitral doctrines. Cause, in the context of Sec. 10(c) effectively means the absence of a prohibited reason. For under our Act management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with all but one specific, definite qualification: it may not discharge when the real motivating factor is to do that which the Act forbids. [*NLRB v. Columbia Marble Works*, 233 F.2d 406, 413 (5th Cir. 1950]

273 NLRB at 222, n. 9. The Board that decided *Taracorp* felt so strongly about this point that it restated it a third time in the opinion:

> We emphasize again that the Board will not seek to determine whether the asserted "cause" for the discharge was good cause or just cause. The extent of our authorized inquiry is whether or not the employee was discharged for union or other protected concerted activity or whether the reason for discharge was, itself, an unfair labor practice.

273 NLRB at 223 n. 14. The *Taracorp* standard for "cause" under Section 10(c), therefore, is "any reason that is not itself a violation of the Act."

The Board next addressed the scope of 10(c) at length in *Anheuser-Busch, Inc.*, 351 NLRB 644 (2007). In that case, the employer violated the Act by installing video cameras without first bargaining with the union that represented a group of employees. The video cameras uncovered evidence that certain employees had engaged in misconduct. The employer confronted employees (with union representation) with the video evidence of the misconduct and the employees admitted the misconduct (use of illegal drugs at work). The employer discharged five employees and suspended 11 employees. The question for the Board in that case was whether it could, or should, order reinstatement and back pay for the employees where the

misconduct would not have been uncovered but for the employer's unilaterally and unlawfully implemented means. The Board in that case quoted liberally from *Taracorp* and held that it did not have the authority to reinstate the employees or to provide back pay to any of the employees.

The Board has not yet addressed the issue of cause under 10(c) in the context of *Total Security* or of its over-ruled predecessor, *Alan Ritchey*. However, at least one ALJ grappled with the issue in a case decided under *Alan Ritchey*. In *Western Cab Company*, 365 NLRB No. 78 (2017), the Board reversed an ALJ's decision that had applied *Alan Ritchey* to events that occurred prior to its decision in *Total Security*. The ALJ decision in that case, issued in September, 2015, however, addressed the applicability of the "cause" provision of Section 10(c) in the context of a failure to bargain with a newly certified bargaining representative in advance of imposing discipline. In that case, the ALJ applied the long-standing *Taracorp* standard, stating that "cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason." *Id.* at 10.

Total Security itself did nothing to change this longstanding and consistent definition of "cause" under Section 10(c). Because the *Total Security* decision was not retroactive, the Board did not have to actually apply its decision to the facts of that case. Instead, it gave general guidance as to future remedial issues, including the issues raised under Section 10(c). The majority in *Total Security* (364 NLRB No. 106) addressed Section 10(c) at pages 13-15 of the opinion. It recognized that Section 10(c) imposed limits on its remedial authority and held that "its application will turn on the specific facts of each case." The Board did not change the legal standard that "cause, in the context of Sec. 10(c), effectively means the absence of a prohibited reason," as stated in *Taracorp*, but rather set forth a procedural framework to determine whether there was "cause" under that standard in any given case:

> We will construe Section 10(c) to preclude reinstatement and back pay if the respondent establishes, consistent with the allocation of proof below, that the employee's suspension or discharge was for cause. In order to do so, the respondent must show that: (1) the employee engaged in misconduct, and (2) the misconduct was the reason for the suspension or discharge. In response, the General Counsel and the charging party may contest the respondent's showing, and may also seek to show, for example, that there are mitigating circumstances or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it would nevertheless have imposed the same discipline.

Total Security, 364 NLRB at 15.

Thus, Section 10(c) prohibits back pay and reinstatement if the employer's reason for termination is actually because of the employee's misconduct. *Total Security* did not purport to define "misconduct", instead leaving in place the longstanding *Taracorp* interpretation that it is a reason "not otherwise prohibited by the Act."

2. *Total Security* Improperly Allocated the Burden of Proof in Section 10(c) Matters

The *Total Security* decision improperly placed the burden of proof for Section 10(c) on the Respondent. For the reasons set forth in the dissent of Member Miscimarra, at pages 34-35 of *Total Security*, whenever the General Counsel seeks reinstatement or back pay, the General Counsel should bear the burden of showing that such a remedy is authorized by the Act and should therefore bear the burden of pleading and proving that discipline was not for "cause" and used in Section 10(c). However, in this case Respondent has satisfied even the improperly allocated burden placed on it by *Total Security*.

3. CHS Had "Cause" to Discharge Dirgni Baker

Respondent had cause under Section 10(c) to terminate Ms. Baker's employment. Ms. Baker engaged in misconduct and that misconduct was the reason CHS terminated her employment, and has established cause under the procedure set forth in *Total Security*. The General Counsel has not shown any mitigating factors or disparate treatment that undermine either of those conclusions. The Board, therefore, may not order reinstatement or award back pay.

a. Baker Engaged in Misconduct

CHS told Ms. Baker that it was terminating her employment "for poor work performance including the failure to conduct yourself in a professional manner." GC 7. The details of that poor work performance were set forth in a 30 page document provided to Ms. Baker and the Union with the notice of termination. GC 6. The incidents set forth in that document were confirmed and supported by testimony and evidence at the hearing. Ms. Baker's poor performance and failure to conduct herself in a professional manner is misconduct.

Anne Howley, CHS' Nurse Manager in its Adult Medicine Department, started working at CHS in May, 2015. In June, 2015, a manager informed Ms. Howley that a patient had complained to her that Ms. Baker had been rude to a receptionist, Rosie Pagan. Tr. 272-75 (Howley); GC 6, p. 9/30. Ms. Baker had snapped at Ms. Pagan stating "look at my face" while circling her hands around her face. GC 6, p. 9/30. Ms. Pagan testified at the hearing and confirmed this behavior. Tr. 436-437 (Pagan). Ms. Howley also personally observed Ms. Baker snap at a patient and make a summoning gesture. Tr. 275-76 (Howley); GC 6 p. 9/30. Ms. Howley personally spoke with Ms. Baker and explained that she needed to be more professional and to have a better tone with her co-workers. Tr. 274-76 (Howley); GC 6, p. 9/30. Ms. Howley

documented that interaction, and it was provided as part of the termination paperwork. GC 6 at 9/30. Ms. Baker testified at the hearing and did not challenge the accounts of Ms. Pagan and Ms. Howley concerning this incident. Tr. 203-65 & 525-545 (Baker).

Shortly after she began at CHS in May, 2015, Ms. Howley emphasized to employees that they should not use cell phones in the clinical area. Tr. 280 (Howley). In early July, 2015, Ms. Howley had a specific conversation with Ms. Baker reminding her not to use her cell phone in the clinical area. Tr. 281 (Howley); GC 6, p. 10/30. On July 14, 2015, Ms. Howley observed Ms. Baker several times using her cell phone in the clinical area. Tr. 281-82 (Howley). Ms. Howley issued Ms. Baker a formal warning for that infraction. Tr. 281-82 (Howley); GC 6, at 10/30. Ms. Baker testified at the hearing but did not challenge Ms. Howley's account of this incident. Tr. 203-65 & 525-45 (Baker).

In September, 2015, Ms. Baker was rude to a co-worker in the manner in which she complained about the co-worker transferring a call. Tr. 283-84 9 (Howley); GC 6 at 11/30. Ms. Howley observed Ms. Baker being excessively distracting to staff. Tr. 282 (Howley); GC 6 at 11/30. And on October 1, 2015, Ms. Howley observed Ms. Baker using her cell phone in a clinical area. Tr. 281 (Howley); GC 6 at 11/30. Ms. Howley issued Ms. Baker another formal warning for this behavior. GC 6 at 11-12/30. Tr. 281 (Howley). Ms. Baker testified at the hearing but did not challenge Ms. Howley's account of this incident or deny that she received this warning. Tr. 203-65 & 525-45.

In the first three months of 2016, Ms. Baker repeated much of the same misconduct. Ms. Howley testified that, because of communication issues with the provider with whom Ms. Baker was working, CHS reassigned Ms. Baker to another provider. Tr. 288-89 (Howley); Tr. 486-87

(Ashman). Ms. Howley met several times with Ms. Baker in the beginning of 2016 to address her performance issues. Tr. 288-89 (Howley); GC 6 at 14/30. On March 8, 2016, Ms. Baker rudely yelled at a co-worker, Maria Guzman, which Ms. Guzman confirmed at the hearing. Tr. 402-405 (Guzman); GC 6 at 13/30 & 14/30. As a result of these issues, Ms. Howley issued Ms. Baker a "Notice of Final Warning" that once again made clear what was expected of her and how she had been failing to meet expectations. GC 6 at 14-16/30. Ms. Baker testified that she received and understood the warning. Tr. 542-43 (Baker). Ms. Baker did not contradict the accounts of Ms. Howley or Ms. Guzman concerning the underlying incidents.

Later in March, 2016, Ms. Baker was rude to another co-worker, Kemauli Brown. Tr. 398 (Brown). Mr. Brown informed Ms. Howley of the incident. Tr. 398 (Brown); GC 6 at 17/30; Tr. 291-92 (Howley); GC 6 at 17/30. Ms. Howley discussed it with Ms. Baker. Tr. 292 (Howley).

In June, 2016, Ms. Baker had a dispute with another co-worker, Angelita Capo. Tr. 292-95 (Howley); Tr. 487-88(Ashman); GC 6 at 18-21/30. Ms. Howley attempted again to work with Ms. Baker to improve her behavior and interactions with co-workers. Tr. 295-97 (Howley). Ms. Howley and Ms. Ashman, the Medical Assistant Supervisor, ran four "Team Building" sessions with Ms. Baker and Ms. Capo to improve inter-personal relations. Tr. 295-97 (Howley); Tr. 488-89 (Ashman); GC 6 at 22/30. Ms. Baker confirmed that she attended these team building sessions. Tr. 542-43 (Baker). Ms. Baker did not dispute the evidence concerning the underlying misconduct.

In October, 2016, Ms. Baker had another negative interaction with yet another co-worker. Nicoll Rodriguez testified that Ms. Baker grabbed Ms. Rodriguez' arm as Ms. Rodriguez

attempted to assist Ms. Baker in finding a patient. Tr. 408 (Rodriguez). Ms. Rodriguez was so upset about the interaction that she cried. Tr. 433 (Rodriguez). After discussing the matter with her boyfriend, Ms. Rodriguez approached Ms. Baker to discuss the interaction. Tr. 425 (Rodriguez). When the two were unable to agree as to what occurred, they went to discuss it with Ms. Howley. Tr. 408 (Rodriguez); Tr. 544 (Baker); Tr. 298-300 (Howley). Ms. Baker told one version of events first, and then change her version of events. Tr. 409 (Rodriguez); Tr. 301 (Howley); R-3. While disagreeing with some of the details as relayed by Ms. Rodriguez, Ms. Baker confirmed the broad outlines of the interaction and her dispute with Ms. Rodriguez. Tr. 540-46 (Baker); GC 6 at 30/30.

Finally, on January 3, 2017, Ms. Baker once again acted rudely to a co-worker. Ms. Baker was concerned about some scheduling issues related to the provider with whom she worked. Tr. 453-59 (O'Donnell). Ms. Baker started a conversation with Ms. O'Donnell by saying her first name: "Kylie." Ms. O'Donnell responded by saying "what?". Tr. 456 (O'Donnell); GC 6 at 4/30. Rather than continue the conversation, Ms. Baker took offense and said "Don't say that to me, that's not a yes, What is just a question." Tr. 456 (O'Donnell). Ms. O'Donnell was taken aback by Ms. Baker's tone, which she found to be rude. Tr. 457 (O'Donnell). This occurred in the reception area in view of waiting patients. Tr. 454-56 (O'Donnell). Alexandra Santiago, a CHS employee who was also present, testified that Ms. Baker's tone and attitude were rude towards Ms. O'Donnell. Tr. 493 (Santiago); GC-6 at 5/30. Ms. Baker confirmed that she said words to the effect of "What is a question. Yes is the answer." Tr. 229 (Baker); GC 6 at 6/30 & 8/30).

Dirgni Baker had longstanding and repeated problems interacting with her co-workers in a positive and productive manner and otherwise conforming to the reasonable and legitimate

expectations of her employer. CHS had warned Ms. Baker, disciplined Ms. Baker, coached and counseled Ms. Baker, and otherwise tried to turn Ms. Baker into a responsible employee, to no avail. Those repeated problems constitute "misconduct" under *Total Security*'s interpretation of Section 10(c) of the Act.

General Counsel implied at the hearing that the January 3, 2017 incident between Ms. Baker and Ms. O'Donnell by itself did not rise to the level of "misconduct" and may argue therefore that there was no misconduct. That is nonsense. In Ms. Baker's case it is impossible to cabin off her behavior on January 3, 2017 from her behavior over the preceding 18 months and the repeated warnings, counseling's and advice given to her to change that behavior. When an employee is counseled repeatedly about negative interactions with co-workers and then engages in another negative interaction with a co-worker, that last incident is "misconduct." Ms. Baker's history from June 2015 through January 3, 2017 was one of repeated misconduct ending with a "final straw" that was itself misconduct.

b. Baker's Misconduct was the Reason CHS Terminated Her Employment

Having established, fairly conclusively, that Ms. Baker engaged in misconduct through her repeated failure to adhere to CHS policies and her negative interactions with co-workers, the next step of the *Total Security* Section 10(c) "cause" inquiry is whether "the misconduct was the reason for the suspension or discharge." 364 NLRB No. 106 at 15. The uncontested testimony and documentary evidence establishes, without a doubt, that Ms. Baker's repeated misconduct was the actual reason CHS terminated Ms. Baker. Neither the General Counsel nor the Charging Party has even suggested any alternate motivation that CHS may have had in terminating Ms. Baker's employment.

CHS informed Ms. Baker that it was terminating her employment by a letter dated January 18, 2017. GC 7. In that letter, CHS provided the following explanation of the reasons for the decision to terminate employment:

> [Y]our employment with Community Health Services is being terminated effective today, January 18, 2017 for poor work performance including the failure to conduct yourself in a professional manner. Details are described in the Employee Warning Notice provided to you under separate cover.

GC 7. The Employee Warning Notice incorporated into the termination letter by reference is the 30 page document entered into evidence as General Counsel Exhibit 6. That document sets forth, in detail, the misconduct described above. Respondent's stated reason for termination, therefore, was the misconduct that was proven at the hearing.

The decision to terminate Ms. Baker's employment was made by Ms. Howley and by Ms. Bell. Tr. 316 (Howley); Tr. 178-79 (Bell). Both testified that the reason for the termination decision was the accumulated instances of misconduct described in GC 6 and Section 3.b above. Tr. 316 (Howley); Tr. 178-79 (Bell). Contemporaneous communications between Ms. Bell and Ms. Howley concerning the situation that were introduced at the hearing by the General Counsel confirm that Ms. Baker's repeated instances of problems with co-workers motivated the decision to end her employment. GC 30; GC 31; GC 32; GC 33; GC 34; GC 35; GC 36; GC 37; GC 38.

There are no allegations in this case that CHS had any unlawful motive in terminating Ms. Baker's employment.

The General Counsel implied at the hearing that there was some significance to the fact that Ms. Howley had wanted to terminate Ms. Baker for her role in the dispute between Ms. Baker and Ms. Rodriguez in October, 2016. Tr. 347-49 (Howley). Perhaps the General Counsel

intends to argue that unless the January 3, 2017 incident was the sole reason for Ms. Baker's termination CHS has failed to show that Ms. Baker's misconduct was the reason for the decision to terminate. If so, that reflects an almost willful misunderstanding of the reason Respondent terminated Ms. Baker's employment. CHS told Ms. Baker and the Union on January 4, 2017 that it was concerned about the January 3, 2017 incident in light of her prior record. R1. CHS told the Union on January 10, 2017 that the January 3, 2017 incident was of particular concern because of Ms. Baker's past misconduct. Tr. 23, 46-50 (Hermanson); Tr. 72, 188 (Bell). Ms. Howley thought that CHS should fire Ms. Baker after the October, 2016 incident. Tr. 347-49 (Howley). The organization, however, did not act on Ms. Howley's desire at that time. Tr. 348 (Howley). Ms. Howley also thought that CHS should fire Ms. Baker after the January 3, 2017 incident. Tr. 355-57 (Howley). Following the January 3, 2017 incident and review of Ms. Baker's misconduct over the preceding 18 months, Ms. Bell agreed with Ms. Howley. Tr. 316 (Bell). The January 3, 2017 incident triggered the termination, which was the result of Ms. Baker's misconduct over the prior 18 months.

c. The General Counsel Has Not Shown That Ms. Baker's Misconduct was Not the Real Reason for CHS's Decision to Terminate Her Employment

Respondent has clearly established that Ms. Baker engaged in misconduct and that misconduct was the reason CHS terminated her employment. The next step under *Total Security*, is that:

> the General Counsel and the charging party may contest the respondent's showing, and may also seek to show, for example, that there are mitigating circumstances, or that the respondent has not imposed similar discipline on other employees for similar misconduct. If the General Counsel and charging party make such a showing, the respondent must show that it nevertheless would have imposed the same discipline.

364 NLRB No. 106 at 15. As noted above, *Total Security* did not evince any indication that it was changing the substantive law that "cause" under Section 10(c) is "any reason that is not itself a violation of the Act." 273 NLRB at 222, n. 9 Neither the General Counsel nor the charging party (1) contested the Respondent's showing that the reason it terminated Ms. Baker's employment was her 18 months of misconduct; (2) demonstrated mitigating factors concerning that misconduct; or (3) showed that Respondent had not imposed discipline on any employees who had anything like a similar history of misconduct.

As noted above, neither the General Counsel nor the charging party posited any possible motive for CHS' decision to terminate Ms. Baker other than the misconduct set forth in the termination documents.

The General Counsel and the charging party also did not show mitigating factors that are relevant to this inquiry. General Counsel and charging party chose to limit Ms. Baker's hearing testimony to only the January, 2017 incident and the October, 2016 incident. While Ms. Baker downplayed her culpability in those incidents, she offered no mitigating factors – such as a lack of knowledge of expectations, or particular outside stressors in her life that might cause her to be rude with co-workers, or entrapment, or remorse, or any other mitigating factors. Instead, General Counsel and charging party chose to simply follow Ms. Baker's lead and downplay the misconduct as "no big deal."

Nor did the General Counsel or charging party show that there was any other employee who had 18 months of misconduct with repeated discipline, coaching and counseling, whom CHS did not terminate. The General Counsel noted that an employee in CHS' Behavioral Health Department had been placed on a coaching and counseling program due to some concerns with

her behavior. GC 13; Tr. 165-66 (Bell). That employee improved her behavior and remained employed with CHS. Tr. 166 (Bell). The evidence at the hearing showed that Ms. Baker did not improve her employment despite multiple efforts. The General Counsel also noted that an employee in adult medicine engaged in a negative interaction with a co-worker and, after intervention by the Union, received a warning. GC 14 & 15; Tr. 167-68 (Bell); Ms. Baker had been given several warnings before CHS decided to terminate her employment. Neither of the two comparators had a sustained history of inappropriate conduct that had not been solved.

4. Reinstatement and Back Pay Would Not Effectuate the Purposes of the Act in This Case.

Even if Section 10(c) did not explicitly prevent an order reinstating Ms. Baker and granting her back pay, the Board should refrain from doing so in this case because it would not effectuate the purposes of the Act. The Board in *Taracorp*, noted that even if it were not precluded by statute from ordering reinstatement as a remedy for a *Weingarten* violation, it would refrain from doing so because it would not further the Act. In that context, the Board noted that "the Board's expansionist policies in the *Weingarten* field have served to 'encourage the transformation of investigatory interviews into formalized adversary proceedings, a result that the Supreme Court clearly wished to avoid." *Taracorp*, 273 NLRB at 223.

In this case, it is undisputed that CHS gave notice to the Union before it made a final decision on the level of discipline and met with the Union to discuss the proper level of discipline. CHS also offered to continue bargaining with the Union after it terminated Ms. Baker's employment, and the Union ignored that offer. If the ALJ (or the Board) determines that this was not sufficient bargaining under *Total Security*, then the purposes of the Act can be fully effectuated by the Board issuing a decision clarifying the scope, ordering CHS to act differently

if the situation recurs, and alerting other employers in a similar situation what is expected of them. There is no need to give a windfall to Ms. Baker or an effective monetary penalty to CHS.

The *Total Security* situation only occurs in the period between initial certification of a union as the representative of a group of employees and the consummation of an initial collective bargaining agreement. First contracts involve a large number of issues about which employers and the newly certified unions must negotiate, and in many cases involve an employer's first exposure to the bargaining rules that have been built up over the course of eight decades under the Act. Employers and Unions may both make mis-steps during this period – providing for the reinstatement of an employee whom the employer has determined should be separated and potentially significant back pay could very easily become the tail that wags the dog of the collective bargaining process, making resolution of unfair labor practice charges and an initial agreement that much more difficult. With possible reinstatement and back pay at issue, unions will find it difficult to reach a compromise with the employer without fear of a claim that it breached its duty of fair representation to the employee at issue and disputes such as this one will go forward when they would otherwise be resolved. At least in cases like this, in which the employer at the very least made a good faith effort to bargain in advance of making a final disciplinary decision, the ALJ and the Board should refrain from turning a technical violation into a costly endeavor for both the employer and the Union.

5. If Awarded, Back Pay Should Be Limited

CHS terminated Ms. Baker's employment on January 18, 2017. Eight days later, Ms. Baker got another job. Tr. 244 (Baker). That job paid more money than Ms. Baker had been earning at CHS. Tr. 263 (Baker). Ms. Baker testified that she lost that job when she refused to start work at 8 am. Tr. 258-60 (Baker). Ms. Baker explained at the hearing that she left her new

employer on February 21, 2017, because the employer abruptly changed her hours to hours that would not work with her child care schedule. Tr. 258-60 (Baker). However, Ms. Baker also testified that she could have worked the new hours had she paid $30 per day for her children to attend an early school program. Tr. 260 (Baker). CHS should not be charged with Ms. Baker's failure to meet the job expectations of her subsequent employer.

In addition, the Union simply ignored CHS' March 30, 2017 invitation to continue bargaining. Even if back pay were to be awarded and not cut off as a result of Ms. Baker's subsequent employment, it should be certainly be tolled during the period following the Union's refusal to continue to bargain with CHS.

Conclusion

Community Health Services followed the National Labor Relations Act as interpreted by the Board in *Total Security*. CHS properly terminated Dirgni Baker for repeated inappropriate interactions with co-workers and an inability to perform her duties as the employer required. This matter should be dismissed.

BY ITS ATTORNEY

THE RESPONDENT
Community Health Services, Inc.

By _____

Hugh F. Murray, III
McCarter & English, LLP
CityPlace I, 185 Asylum Street
Hartford, CT 06103
Tel: (860) 275-6753
Fax: (860) 560-5903

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 1 – SUBREGION 34

COMMUNITY HEALTH SERVICES, INC. and AMERICAN FEDERATION OF TEACHERS, CT AFT, AFL-CIO	Cases 01-CA-191633

CERTIFICATE OF SERVICE OF: RESPONDENT'S BRIEF

On **February 15, 2018**, I served the above-entitled document by **regular mail and electronic mail** upon the followings, addressed to them at the following addresses:

Elizabeth Guerra
Field Representative
AFT Connecticut
35 Marshall Road
Rocky Hill; CT 06067-1400
eguerra@aftct.org

John McGrath
NLRB SubRegion 34
450 Main St., Ste 410
Hartford, CT 06103-3078
John.McGrath@nlrb.gov

Michael Doyle, Esq.
Ferguson, Doyle & Chester, P.C.
35 Marshall Rd.
Rocky Hill, CT 06067-1400
michaeldoyle@fdclawoffice.com

Hugh F. Murray, III